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DAVID SMALL
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In re Application of
Small :
Application No. 10/527,747 : DECISION
Filed: 14 March, 2005 :
Attorney Docket No. (None) :

This is a decision on the petition, filed on 17 December, 2007, for revival of an application abandoned due to unavoidable delay under 37 C.F.R. §1.137(a).¹

NOTE: The instant petition appears to have been submitted by one who is not registered to practice before the Office and who is not the named inventor. Applicant's attention is drawn to 35 U.S.C. §2(b)(2)(D) and 35 U.S.C. §33. Applicant's attention is further drawn to the provisions of 37 C.F.R. §1.31 and §1.32.

The petition under 37 C.F.R. §1.137(a) is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(a)."

This is **not** a final agency action within the meaning of 5 U.S.C. §704.

¹ A review of the extensive discussion at/in the guidance set forth in the commentary at MPEP §711.03(c)(1)(A) and (B) might suggest that the factual averments set forth in the instant petition may be appropriate for a petition (no fee) to withdraw the holding of abandonment and consideration under 37 C.F.R. §1.181. However, Applicant's failure to seek relief timely under the rule (within two (2) months of the action complained of (Notice of Abandonment) leaves Applicant with a petition to revive under the provisions of 37 C.F.R. §1.137(a) or (b) as the proper route to obtain a return to pending status for the instant application.

As to Allegations of
Unavoidable Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(a) are the petition and fee therefor, a reply, a proper showing of unavoidable delay under the regulation, and, where applicable, a terminal disclaimer and fee. (However, it does not appear that a terminal disclaimer and fee are due here.)

Applicant does not appear to satisfy (with the necessary documentary support under the rule) the showing requirements as to unavoidable delay. Applicant will need to provide a copy of the docket record (or file jacket cover detailing transactions) with an averment of search and failure to find, along with a copy of the due-date calendar for the date on which the timely reply was due for the Office action in question.

It is noted, however, that of the three mailings—the 19 October, 2006, Office action, the 31 October, 2006, non-final Office action, and the 31 May, 2007, Notice of Abandonment—to Applicant at the address set forth above, Applicant's petition and the statement of John Sanderson MD (identified as the "householder at 9 Island View, Irvine, CA 92604) avers that John Sanderson MD "never received an Office action" and the petition avers that this pattern of non-receipt includes the Notice of Abandonment (Petition, page 1, fourth paragraph.). Applicant's continued reliance upon this address for Office correspondence might be found not to be reasonable in light of the Applicant's stated history of non-delivery/non-receipt.

BACKGROUND

The record reflects as follows:

Applicant failed to reply timely and properly to the non-final Office action mailed on 31 October, 2006, with reply due absent extension of time on or before 31 January, 2007.

The application went abandoned after midnight 31 January, 2007

The Office mailed the Notice of Abandonment on 31 May, 2007.

On 17 December, 2007, Applicant filed the instant petition with fee, a reply in the form of an amendment, and a statement that he did not receive the non-final Office action or the Notice of Abandonment, and a statement of John Sanderson MD (identified as the "householder at 9 Island View, Irvine, CA 92604) avers that John Sanderson MD "never received an Office action" and the petition avers that this pattern of non-receipt includes the Notice of Abandonment (Petition, page 1, fourth paragraph.).

Applicant provided no documentation as the requisite support of the averment, as outlined in the discussion at commentary at MPEP §711.03(c), of a petition averring unavoidable delay.

Out of an abundance of caution, Applicants always are reminded that those registered to practice and all others who make representations before the Office are reminded to inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.²

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application.

As to Allegations of
Unavoidable Delay

The requirements under 37 C.F.R. §1.137(a) have not been satisfied as of this writing in that Applicant failed to make the showing required.

CONCLUSION

Accordingly, The petition under 37 C.F.R. §1.137(a) is dismissed.

ALTERNATIVE VENUE

Alternatively, Applicant may file a petition under 37 C.F.R. §1.137(b) and aver unintentional delay. (See:

http://www.uspto.gov/web/offices/pac/mpep/documents/0700_711_03_c.htm#sect711.03c)

A petition to revive on the grounds of unintentional delay must be filed promptly and such petition must be accompanied by the reply, the petition fee, a terminal disclaimer and fee where appropriate and a statement that “the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional.” (The statement is in the form available online.)

Further correspondence with respect to this matter should be addressed as follows:

² See supplement of 17 June, 1999. The Patent and Trademark Office is relying on Applicant's duty of candor and good faith and accepting a statement made by Applicant. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office).

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By hand: U. S. Patent and Trademark Office
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 Alexandria, VA 22314

By facsimile: (571) 273-8300
 Attn: Office of Petitions

While telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214, it is noted that all practice before the Office is in writing (see: 37 C.F.R. §1.2³) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Applicant's action(s).

/John J. Gillon, Jr./
John J. Gillon, Jr.
Senior Attorney
Office of Petitions

³ The regulations at 37 C.F.R. §1.2 provide:

§1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.